

a

CHEN CHOY & SON REALTY SDN. BHD.

v.

GANESHA GANAPATHY & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[ORIGINATING SUMMONS NO. F 1360/84]

10 OCTOBER 1987

CIVIL PROCEDURE: *Consent order - Application to rescind consent order - Parties (co-owners) agreed land be sold by public auction and proceeds of sale be distributed - Whether any distinction between 'consent judgment' and 'consent order' - Question of estoppel.*

c

This was an application by the defendants to have the consent order rescinded.

Held:

d

[1] The Court did not consider any merit in defendant's contention that there is a distinction between a 'consent judgment' and a 'consent order' as the *Hock Hua Bank's* case and *Tio Chee Hing's* case show that the application to set aside an order or judgment regularly obtained cannot be entertained in the same suit but in a separate action filed for that purpose.

[2] As the consent order has been regularly obtained and the defendant's application does not come under O. 28 r. 11 of the Rules of the High Court 1980, neither do the reasons given for the application amount to reasons sufficient to set aside an agreement, the Court decided that it had no jurisdiction to entertain the defendants' application and accordingly dismissed it with costs.

e

[Application dismissed with costs.]

Cases referred to:

Ganapathy Chettiar v. Lum Kum Chum & Ors. [1981] 2 MLJ 145

Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143

Ainsworth v. Wilding [1896] 1 Ch 673

f

Tio Chee Hing v. Tractors Malaysia Bhd. [1973] 1 MLJ 66

Legislation referred to:

Rules of the High Court 1980, O. 28 r. 11

For the defendants/applicants - Dennis Xavier; M/s. Xavier & Chandran

For the plaintiff/respondent - D.P. Naban; M/s. Skrine & Co.

g

JUDGMENT**Siti Norma Yaakob J:**

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Both the plaintiff and defendants in this originating summons are the co-owners of undivided shares of 2 pieces of land over which the plaintiff holds a 405/576 share and the defendants 171/576 share. The plaintiff now wishes to develop its share of the lands and to enable it to do so, applies to Court to have the lands partitioned in the manner suggested by a firm of consultant land surveyors. The defendants object to the partitioning sought, on the ground that the plaintiff has chosen for itself the best part of the lands and a partition most favourable to it. To resolve their long standing issue and to determine their co-ownership, the parties agreed on 12 April 1985, that the lands be sold by public auction and the proceeds of the sale be distributed in the proportion of the shares each has over the lands.

i

However, 2 years and 2 months later, the defendants apply to have the consent order rescinded and that the lands be partitioned instead in one of the 2 modes as suggested by

the plaintiff in this originating summons. The reason of this change of heart appears to be that since the order of sale was obtained on 12 April 1985, the land has not been sold and conditions in the property market being what they are, the defendants feel that partition will be a more feasible solution.

a

From the Court file, two dates of auction had been fixed. The first scheduled for 20 August 1986, did not take place as the advertisement of the sale which had been undertaken by the plaintiff's solicitors, had not been done. A second auction date was then fixed for 27 July 1987, but the auction was postponed 2 days before that in view of the defendants' application to have the order of sale by public auction rescinded. From the records, it is very clear that the delay in effecting the auction was largely due to the parties themselves.

b

The order sought to be rescinded by the defendants is a consent order and following the decision of *Ganapathy Chettiar v. Lum Kum Chum & Ors.* [1981] 2 MLJ 145, that in itself is evidence of a contract between the parties that bind all parties to the order, all the more so, where there is not the slightest question of mistake as to facts or law. It can also be pleaded as an estoppel and the only way the consent order can be rescinded is when the plaintiff agrees to the rescission and since it is objecting to the defendants' application, the only cause open to the defendants is to file a fresh action against the plaintiff to impeach the consent order.

c

d

In *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143, Chang Min Tat FJ outlines the jurisdiction of the Court when dealing with an application to set aside or vary any judgment it has made as follows:

Clearly the Court has no jurisdiction in any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it had been drawn up, except under the slip rule in O. 28 r. 11, so far as it is necessary to correct errors in expressing the intention of the Court.

e

In *Ainsworth v. Wilding* [1896] 1 Ch 673, Romer J held that after a judgment had been passed and entered even where it has been taken by consent and under a mistake, the Court cannot set aside otherwise in a fresh action, brought for the purpose unless (1) there has been a clerical mistake or an accidental slip or (2) the judgment as drawn up does not correctly state what the Court actually decided or intended to decide.

f

The same enunciations of the law were followed in *Tio Chee Hing v. Tractors Malaysia Bhd.* [1973] 1 MLJ 66, where the Federal Court further held that a consent order may be set aside for reasons sufficient to set aside an agreement.

In the application before me, the defendants were not applying to correct any mistake. Their Counsel drew a distinction between a consent judgment and a consent order in an attempt to show that the authorities cited by the plaintiff apply to consent judgments only. I do not consider that there is any merit to this contention as the *Hock Hua Bank Bhd.*'s case and the *Tio Chee Hing*'s case above, show that the application to set aside an order of judgment regularly obtained cannot be entertained in the same suit but in a separate action filed for that purpose.

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h

As the consent order dated 12 April 1985, has been regularly obtained and the defendant's application does not come under O. 28 r. 11, neither do the reasons given for the application amount to reasons sufficient to set aside an agreement, I had decided that I had no jurisdiction to entertain the defendants' application and I accordingly dismissed it with costs.

i